United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2676

To be argued by
PHYLIS SKLOOT BAMBERGER

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
EUGENE FRANK IRONS,

Appellant,

-against-

ERNEST L. MONTANYE,
Superintendent,
Attica Correctional Facility,

Appellee.

Docket No. 74-2676

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

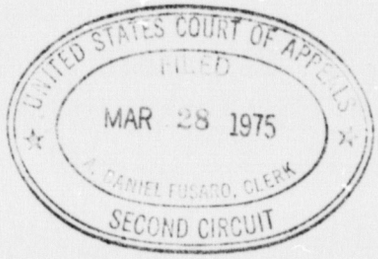

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TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
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ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the District Court's denial of the writ premised on the opinion in an earlier habeas corpus proceeding is error requiring reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Western District of New York (Curtin, D.J.) entered on March 24, 1974, denying a petition for writ of habeas corpus.

This Court, by order dated January 3, 1975, assigned The Legal Aid Society, Federal Defender Services Unit, as counsel for appellant Eugene Irons on this appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. State Court Proceedings

Appellant was indicted for burglary in the third degree and grand larceny in the first degree arising from events which took place on July 16, 1965.

His first trial occurred on April 4, 5, and 6, 1966. At that trial, the State produced evidence that a burglary had occurred at a jewelry company during the night of July 16, 1965. There were no witnesses to the crime, and no one identified or connected appellant with the crime.* The evidence connecting

*The transcript of the first State trial was transmitted to counsel by the Clerk of the Onondaga County Court pursuant to an order of this Court (Feinberg, C.J.) dated February 10, 1975.

appellant to the crime was the jewelry found in two suitcases he was holding at the time of his arrest and his own statements.

During the course of the trial, Harry Krzykowski, a Syracuse, New York, police officer assigned to investigate the burglary, testified that he confronted appellant at the Greyhound Bus Terminal in Syracuse at about 12:25 a.m. on July 26, 1965. Krzykowski was at the terminal because

> we had been alerted that he [Irons] may try to leave tomorrow on a Greyhound bus, and I was detailed along with Sergeant Barrett to check and to see if he did, and perhaps apprehend him while he was trying to get a bus to leave town.
>
> (59*).

Krzykowski saw appellant enter the bus depot carrying two handbags, confronted him, and asked appellant to identify himself (60). Appellant first gave an incorrect name and then identified himself as Irons (60-61). The officers opened both suitcases and found jewelry in them. Appellant was then arrested.

The officers had a search warrant for appellant,** but there is no indication in the record it was shown to him (60). The warrant stated:

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*Numerals in parentheses refer to pages of the transcript of the trial.

**A copy of the search warrant is annexed as "E" to appellant's separate appendix. This copy of the search warrant was obtained by counsel for appellant from the District Attorney of Onondaga County. The warrant is marked "Exhibit 3," but according to the accompanying letter of the District Attorney, it is the only search warrant in this case on file with that office. In the search for a copy, no other warrant has been mentioned or forwarded to counsel.

To any Peace Officer in the County of Onondaga

Proof, by affidavit, having been this day made before me, by Sgt. Duane Metzger that there is probable cause for believing that Frank E. Irons AKA Eugene Frank Irons has in his possession one 38 Cal Smith & Wesson Snub Nose revolver Ser # C-182596 that was stolen in the commission of a Burglary at room 103-436 S.Salina St. in the City of Syracuse, N.Y. on 16 July, 1965.

(Appendix E).

No challenge to the search and seizure was made at trial. It appears from subsequent proceedings that on the appeal to the Appellate Division from the judgment that appellant filed a pro se brief raising the issue of the validity of the search warrant.*

The Appellate Division affirmed the conviction without opinion on May 9, 1968, and leave to appeal was denied on November 13, 1968.

B. Federal Court Proceedings

In a pro se petition dated December 30, 1968, and filed in the United States District Court for the Western District of New

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*In an order entered on April 24, 1969, denying appellant's first petition for writ of habeas corpus, Judge Burke ruled that there had been no attack on the search and seizure in the State court proceedings. Thereafter appellant advised Judge Burke of a pro se brief raising the issue, and Judge Burke ordered the State to submit the brief to him. He then modified his opinion apparently in accord with that brief (see Appendix D). The Appellate Division no longer has a copy of the brief and the District Attorney's office has not supplied one, although it dif did send a copy of its own brief to counsel.

York, appellant alleged that the affidavit upon which the warrant was issued was based on hearsay information. Documents filed with the District Court show that appellant tried to obtain copies of the search warrant and affidavit in support of the warrant from the County Clerk of Onondaga County and the Syracuse Police Department. The clerk's office advised that it did not have the documents; the Police Department advised that a court order would be necessary to obtain them.

On July 3, 1969, Judge Burke denied the writ (see Appendix D), saying:

> 7. On the evidence before me I find: the petitioner was arrested on July 26, 1965 by officers of the Syracuse Police Department at 12:25 A. M. at the Greyhound Bus Station in Syracuse, N. Y. He was carrying two small suitcases. Armed with a search warrant, and exhibiting the search warrant to the petitioner, the police officers searched the suitcases and found that one was filled with jewelry (transcript p. 61). At the trial, the fruits of the search were offered and received in evidence without objection by the petitioner's counsel (p. 84, trial transcript). The search was a valid and legal search. It was valid as an incident to a lawful arrest. It was also authorized by a valid and legal search warrant.
>
> Opinion of Judge Burke, Appendix D, at 3-4.

The Judge found the papers before the court sufficient to allow resolution of the issues, and found further that it was not necessary to hold a hearing. The prior orders of the court show that the Judge had before him the trial transcript, the briefs in the Appellate Division, and the pro se brief with

attached papers filed by appellant in the Appellate Division. There is no indication that the affidavit or search warrant were before Judge Burke.

This Court denied a certificate of probable cause on October 15, 1969.

Appellant filed a second petition for writ of habeas corpus on June 11, 1972. That petition urged that the search and seizure were invalid because the warrant had not been executed within ten days of its issuance, was not supported by an affidavit justifying a nighttime search, and that he was not given an opportunity to controvert the search warrant.

Judge Curtin referred the proceedings to a magistrate. The magistrate's report refers to the exhibits attached to an affidavit of appellant in the prior habeas corpus proceeding. The magistrate relied on the earlier opinion (Appendix D) of Judge Burke which stated that the search warrant was valid and that the search was incident to a lawful arrest, and recommended denial of the writ. Based on the magistrate's report, Judge Curtin denied the writ (see Appendix B).

By order dated December 19, 1974, this Court granted the certificate of probable cause.

ARGUMENT

THE DISTRICT COURT'S DENIAL OF THE WRIT PREMISED ON THE OPINION IN AN EARLIER HABEAS CORPUS PROCEEDING WAS ERROR REQUIRING REVERSAL OF THE ORDER.

In his petition, appellant argued that the search of his person and belongings and the seizure of the suitcases, both of which occurred at night, were not valid because the search warrant did not properly authorize a nighttime search. Judge Curtin denied the writ premised on an earlier opinion of Judge Burke. That earlier opinion held the search of appellant to be valid as an incident to a valid arrest and pursuant to a valid search warrant. Judge Curtin's opinion must be reversed and the case remanded for consideration of the issue because Judge Burke's opinion was both irrelevant and incorrect.

A. The Issues Raised

The first pro se habeas corpus petition challenged the warrant saying it was premised on a hearsay affidavit. Judge Curtin apparently believed that Judge Burke's earlier ruling that the warrant was valid was binding in this case. However, the issue raised here was not before Judge Burke, and there is no specific indication in his opinion that he considered the question of nighttime search when he was asked to consider only the hearsay basis of the affidavit. Since the application

could be denied only if the same ground had been previously determined on the merits (Sanders v. United States, 373 U.S. 1, 17 (196)), with all doubts as to such resolution being determined in petitioner's favor (Sanders v. United States, supra, 373 U.S. at 16), Judge Curtin improperly relied on Judge Burke's prior decision.

Further, the record does not show whether Judge Burke had before him or considered the affidavit in question. The record is limited to showing that he saw the pro se briefs, counsels' briefs, and the trial record. Other documentary evidence was seen, but never identified, and it is clear from appellant's letters to the County Clerk and the Police Department that he was not able to get the affidavit.* Thus, Judge Burke could not have resolved this issue on the merits.

B. The Validity of the Search and Seizure

The search warrant issued for the search of appellant's person (see Appendix E) stated that there was probable cause to believe that appellant was in possession of a gun used in a burglary and authorized a search of him during day or night.

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*This, as well as the fact that appellant proceeded throughout without counsel, would cure any claim by the State that the second petition was an abuse of the writ. Sanders v. United States, supra, 373 U.S. at 9-18.

The validity of the clause permitting the nighttime search, which actually occurred in this case, depended on the contents of the affidavit which resulted in the issuance of the warrant.

What was contained in that affidavit is unknown. However, to authorize the nighttime search validly it was necessary under then-effective §801 of the former New York Code of Criminal Procedure* that the affidavit state that the officer was positive that the property sought was to be found on the person to be searched.** Rule 41(c) of the Fed.R.Cr.P. requires

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*Former New York Code of Criminal Procedure, §801, provided:

> The magistrate must insert a direction in the warrant, that it be served in the day time, unless the affidavits be positive that the property is on the person, or in the place to be searched, in which case, he may insert, a direction that it be served at any time of the day or night.

**§801 of the New York Code of Criminal Procedure was in effect at the time of these events, but has been superseded by the Criminal Procedure Law, §690.35, which provides, in relevant part:

> 1. An application for a search warrant must be in writing and must be made, subscribed and sworn to by a public servant specified in subdivision one of section 690.05.
>
> 2. The application must contain:
>
> (c) Allegations of fact supporting such statement. Such allegations of fact may be based upon personal knowledge of the applicant or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The applicant may also submit depositions of other persons containing allegations of fact supporting or tending to support those contained in the application; ...

the same showing. Jones v. United States, 357 U.S. 493 (1958). Since the standard for evaluating the validity of a warrant is

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(Footnote continued)

2. The application may also contain:

(a) A request that the search warrant be made executable at any time of the day or night, upon the ground that there is reasonable cause to believe that (i) it cannot be executed between the hours of 6:00 A.M. and 9:00 P.M., or (ii) the property sought will be removed or destroyed if not seized forthwith; and...

Any request made pursuant to this subdivision must be accompanied and supported by allegations of fact of a kind prescribed in paragraph (c) of subdivision two.

11-A, McKinney's Consolidated Laws of New York, Annotated (1971).

While §690.35(3)(a) requires only a showing of probable cause, there is nothing on this record to show that the search could not be conducted during daylight hours or that the property was to be removed. In Point B, infra, probable cause is to be discussed.

the same whether under state or Federal law (Aguilar v. Texas, 378 U.S. 108, 110 (1964)), it is clear that a positive belief in the presence of the property, rather than the usual "probability," is what was required. United States v. Arms, 392 F.2d 300 (6th Cir. 1968); see also United States v. Ravich, 421 F.2d 1196, 1201 (2d Cir. 1970).

Here, with the affidavit not available, it is unknown whether that document specifically referred to the gun or the reasons why the officer positively believed that appellant had one. There is no basis for such a belief from the transcript of the trial, for no one saw the crime or appellant.* The apparently incomplete state record requires remand for consideration. Townsend v. Sain, 372 U.S. 293, 319 (1963).

Further, even if the affidavit contained a hearsay allegation concerning appellant's possession of the gun, there is no basis for believing that the information complied with the tests of Aguilar v. Texas, supra, 378 U.S. 108, and Spinelli v. United States, 393 U.S. 410 (1969). Both decisions permit hearsay information to be used to obtain a warrant if the magistrate is informed of some of the underlying circumstances relied upon by the informer and the reasons why the informer is considered reliable or his information credible (378 U.S. at 110-115; 393 U.S. at 415-417).

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*In fact, no gun was found in appellant's possession at the time of his arrest.

The other ground found by Judge Burke to sustain the search was that it was an incident to a valid arrest. However, there is nothing to show that the arrest was based on probable cause to believe that appellant committed a crime. The record discloses only that, for some undisclosed reason, appellant was suspected of burglary, and further, that the police had information from an unknown source that appellant was planning to leave Syracuse by bus. This information is not sufficient to justify an arrest on probable cause.*

Accordingly, on this record there is no basis for concluding that the nighttime search and seizure was valid. The case should be remanded to the District Court for examination of the relevant documents or a hearing on the issue.

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*In his earlier opinion Judge Burke simply stated that the arrest was valid.

CONCLUSION

For the foregoing reasons, the order should be reversed and the case remanded to the District Court for further consideration.

Respectfully submitted,

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Certificate of Service

March 28, 1975

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Phyllis Steinberg